No. 14,725

United States Court of Appeals

For the Ninth Circuit

FRANKLIN SANTOS BOHOL and
HENRY TORRES DIAS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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STATEMENT OF JURISDICTION.

I.

Appellee agrees with the statement of jurisdiction of Appellants (Appellants' Brief, pages 1-2).

II.

Appellee disagrees with Appellants' statement of the case (Appellants' Brief, pages 2, 3) in the following respects: On direct examination defendants' counsel questioned defendant Bohol concerning a con-

viction for possession of marihuana in the Courts of the Territory of Hawaii (R. 26). Subsequently, on cross-examination of this defendant, counsel for appellee questioned defendant about this and one other similar occurrence, that is, a conviction in the District Court of Honolulu (Magistrate's Court). (R. 26-27.) Defendants' Exhibit "A" marked for identification 3-10-55 (R. 23, 24) is, although printed, not a part of the record.

SUMMARY OF ARGUMENT.

Plaintiff's questioning of defendant Bohol, concerning his prior history in the narcotics field, is permissible cross-examination in view of Bohol's testimony on his case in chief.

ARGUMENT.

This case apparently presents a relatively novel question; the reason being the practice of defense attorneys in Hawaii of partially impeaching their own witnesses and exposing their character—notably the defendant when he takes the stand in his own defense.

At the outset it might be well to reflect on the reason for this practice. The first and most striking is to take the wind out of the prosecution's sails by impeaching your witness with his own convictions. Secondarily and importantly, it softens the effect of

showing intention or state of mind by prior similar acts or crimes where necessary on rebuttal.

With this premise in mind, we agree with appellants that to question defendants about prior arrests or convictions which were reversed is error unless the defendant himself has opened up the field. The prosecution, at least in United States Courts, is limited generally to questioning about convictions of felonies to impeach the defendants' credibility. *Metrovich v. U. S.,* 15 F. (2d) 163 (9 Cir. 1926); *Shockley v. U. S.,* 166 F. (2d) 704, (9 Cir. 1948); *Carlton v. U. S.,* 198 F. (2d) 795, (9 Cir. 1952).

The prosecution was not questioning Bohol out of the blue on previous felony convictions—it was pursuing an entirely different course.

The defense had opened up a field of cross-examination. They had questioned the defendant by asking about his conviction for his past dealings in marihuana.

It will be noted that the cross-examination went no further than dealing in marihuana.

In *Metrovich v. U. S.,* (9 Cir. 1926), 15 F. (2d) 163, cited and relied upon by the appellants (Appellants' Brief, pages 4-5), this Court at that time apparently had a novel situation such as this in mind, for at page 164 it is stated

> "but there is nothing in the direct examination tending even remotely to show that the plaintiff in error had not been arrested for crime. No such question was asked, and no such answer

was made. The question propounded on the cross-examination was therefore wholly foreign to anything found in the direct examination."

But here there is something significant in the direct examination.

"Q. (By Mr. Kobayashi.) And, Mr. Bohol, you were convicted once for possession of marijuana in the Territory?

A. Yes, sir.

Q. It was a misdemeanor?

A. A misdemeanor.

Mr. Kobayashi. That's all." (R. 26.)

Obviously *Metrovich* points to the fact that there are situations where questions on these matters may be asked as permissible cross-examination.

It can first be said that a defendant who takes the stand subjects himself to cross-examination like other witnesses. *Raffel v. U. S.,* 271 U.S. 494 (1926); *Madden v. U. S.,* (9 Cir. 1927), 20 F. (2d) 289; *Brown v. U. S.,* (9 Cir. 1953), 201 F. (2d) 767.

The problem facing the Court therefore is—was this permissible cross-examination ? The first possibility is that there is shown a prior history of dealing in narcotics. It would seem clear that defendant's testimony had laid a foundation for some further delving into his past narcotic dealings. This questioning can touch even arrests. (*Banning v. U. S.,* 130 F. (2d) 330, cert. den. 317 U.S. 695.)

Here we have more than an arrest. There is a conviction in the District Court of Honolulu for the

particular offense about which defendant was questioned. Assuming arguendo that Defendants' Exhibit "A" marked for identification (R. 23-24) is before this Court and relates to the alleged error committed, we have the fact that for reasons of his own an Assistant Public Prosecutor for the City and County of Honolulu moved for a *Nolle Prosequi* and that his motion was granted in the Circuit Court of the First Judicial Circuit, Territory of Hawaii (R. 23-24). There is more than a mere arrest here. Where the defendant takes the stand in his own defense cross-examination is not restricted to the precise questions put to him on direct examination but covers the subject matter involved in such questions. The subject matter here involved was his prior dealings in narcotics. *Stewart v. U. S.,* 211 F. 41, (9 Cir. 1914); *Branch v. U. S.,* 171 F. (2d) 337 (D.C. Cir. 1948); *U. S. v. Kendall,* 165 F. (2d) 117 (7 Cir. 1947).

The second ground upon which this questioning is permissible cross-examination follows from the first. Other than strictly practical considerations what was accomplished by defense counsel in his questioning of Bohol? The only issue which could have been raised was defendant's character as a law abiding citizen. To be sure the defense is not raising the issue of his good character but conversely and for reasons of their own, as outlined above, his bad character was brought into issue.

When the defendant took the stand he placed in issue his character traits for truth and veracity. But

after he took the stand he placed in issue a further trait of character that of a law abiding citizen. Once this had been done how far could the government go. It can certainly question about defendant's arrests (*Michelson v. U. S.,* 335 U.S. 469). Again we re-emphasize the oddness of the question presented. Is it the province of the defendant to expose his bad character? If he does, should not the prosecution capitalize upon it?

One further point is to be made before entering into the technicalities of this case. Where is the manifest prejudice that the defendant complains of? He has raised this issue of marihuana convictions—misdemeanor convictions at that. Is it reversible error to question defendant on his brush with the law for a similar offense when defendant has raised the issue himself on his examination in chief. We think not. *Kelly v. U. S.*, 177 F. (2d) 280; *U. S. v. Tramaglino,* 197 F. (2d) 928.

The technicalities of this case raised some interesting points. The first relates to the specific objection made by counsel.

> "Your Honor, I object. If counsel knows anything about these convictions."

The objection apparently relates only to a lack of knowledge on the part of defendant's counsel. The grounds urged in the specification of error certainly does not relate to the grounds of the objection made.

In effect then there was no real objection made or ruled upon. If so, defendant cannot thereafter claim

error. *Beaty v. U. S.,* 203 F. (2d) 652, (4 Cir. 1953); *Olender v. U. S.,* 210 F. (2d) 795, (9 Cir. 1954); *Trice v. U. S.,* 211 F. (2d) 513 (9 Cir. 1954).

Secondly, there is nothing in the record to indicate that Plaintiff's Exhibit "A" marked for identification was ever admitted for any purpose. (R. 23, 24, 25, 26, 27, 28, 29, 30.) Finally, there is no tie-up of the exhibit marked for identification (R. 23, 24) with the specific offense in question. (Ref. R. 28, 29.) Third, there is no denial on the part of defendant that there was a conviction of the defendant in the District Court of Honolulu for the offense. There is instead what might be termed a confession and avoidance on the part of the defense. See discussion *supra* re *Nolle Prosequi.*

CONCLUSION.

That questioning by plaintiff was proper cross-examination. We think it was within the scope of the direct examination, in view of the defendant's testimony on direct. We think it was proper probing of defendant's character put in issue by the defendant. Further plaintiff contends that if this questioning was error it was not reversible error in view of defendant's testimony. Further it appears that if an error was committed there has been no proper preservation of it by proper objection and defendant has waived the error.

It is respectfully submitted that the judgment and sentence of the District Court be affirmed.

Dated, Honolulu, T. H.,
August 19, 1955.

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